



May 15, 2000

Ms. Elizabeth Elam
Taylor, Olson, Adkins, Sralla & Elam
500 Throckmorton Street
3400 Bank One Tower
Fort Worth, Texas 76102-3821

OR2000-1909

Dear Ms. Elam:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 135192.

The City of Azle (the "city"), which you represent, received a request for: 1) the personnel file of a named individual, 2) all documents regarding any state action against various city departments for state and federal violations over a ten-year period, 3) all documents regarding any citizen complaints against the city for lack of repairing or maintaining city systems, equipment or roadways over a ten year period, 4) any documentation regarding the city's use of the Denver Trail Underpass from 1996 through 2000, and 5) any documentation of complaints against the city's police department for misconduct during traffic enforcement or criminal investigations from 1995 through 2000. You state that you have released the information responsive to items 2 through 5. You claim that the information responsive to item 1 is excepted from disclosure under sections 552.101, 552.102, 552.117, and 552.119 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.301 of the Government Code provides that a governmental body must ask the attorney general for a decision as to whether requested documents must be disclosed not later than the tenth business day after the date of receiving the written request. You state that the city received the requestor's written request for information on February 14, 2000. However, your request was incorrectly mailed and you did not resubmit the request until March 10, 2000, more than ten business days after the city's receipt of the requestor's written request. Therefore, we conclude that the city failed to meet its ten-day deadline for requesting an opinion from this office.

When a governmental body fails to request a decision within ten business days of receiving a request for information, the information at issue is presumed public. Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App. -- Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must show a compelling interest to withhold the information to overcome this presumption. See Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App. -- Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). Normally, a compelling interest is that some other source of law makes the information confidential or that third party interests are at stake. Here sections 552.101, 552.102, 552.117, and 552.119 present compelling reasons to overcome the presumption of openness.

Initially, we note that section 552.101 of the Government Code excepts from required public disclosure “information that is confidential by law, either constitutional, statutory, or by judicial decision.” The submitted information contains a drug dependency report, medical evaluation, and declaration of psychological and emotional health from the Texas Commission on Law Enforcement Officer Standards and Education. Section 1701.306 of the Occupations Code provides as follows:¹

(a) The commission may not issue a license to a person as an officer or county jailer unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on

¹The Seventy-sixth legislature enacted section 1701.306 of the Occupations Code and repealed section 415.057 of the Government Code without substantive change.

file in a format readily accessible to the commission. *A declaration is not public information.*

We have marked the information that must withheld pursuant to section 1701.306 of the Occupations Code.

Additionally, the submitted information includes criminal history record information (“CHRI”). Criminal history record information generated by the National Crime Information Center (“NCIC”) or by the Texas Crime Information Center (“TCIC”) is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety (“DPS”) maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov’t Code § 411.083.

Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from the DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. We have marked the CHRI which must be withheld.

Furthermore, the submitted information contains an eligibility verification I-9 form. Release of an eligibility verification form I-9 is governed by title 8, section 1324a of the United States Code. This statute provides that I-9 forms “may not be used for purposes other than for enforcement of [the immigration laws of] this chapter” and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5); *see* 8 C.F.R. § 274a.2(b)(4). Release of this document under chapter 552 of the Government Code would not be for a permitted purpose and, therefore, we conclude that the I-9 form is confidential and must be withheld under section 552.101 of the Government Code.

The submitted documents also contain motor vehicle information that is confidential under section 552.130 of the Government Code. Section 552.130 excepts from required public disclosure information that relates to a motor vehicle operator’s or driver’s license or permit

issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. Therefore, under section 552.130, the city must withhold the Texas driver's license number and the copy of the Texas Driver's License that appear in the submitted documents. We have marked the documents containing this information.

Next, we note that many of the submitted documents contain information that is confidential under section 552.117(2) of the Government Code. Section 552.117(2) provides for the confidentiality of current and former peace officers' home addresses, home telephone numbers, social security numbers, and family member information. We agree with the types of markings you have made and have marked additional information that is excepted from disclosure under section 552.117(2). The city must withhold this information.

Finally, we consider your assertion that the submitted information is excepted under section 552.102 because it contains information in a personnel file. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code §552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976) for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the Act. Therefore, we consider the submitted information under section 552.101. Common law privacy excepts from disclosure private facts about an individual. Therefore, information must be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). In *Industrial Foundation*, the Texas Supreme Court considered intimate and embarrassing information such as that relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683; *see also*, Open Records Decision Nos. 470 (concluding that fact that a person broke out in hives as a result of severe emotional distress is excepted by common law privacy), 455 (1987) (concluding that kinds of prescription drugs a person is taking are protected by common law privacy), 422 (1984) (concluding that details of self-inflicted injuries are presumed protected by common law privacy), 343 (1982) (concluding that information regarding drug overdoses, acute alcohol intoxication, obstetrical/gynecological illnesses, convulsions/seizures, or emotional/mental distress is protected by common law privacy). The common law right of privacy does not protect facts about a public employee's misconduct on the job or complaints made about his performance. *See* Open Records Decision Nos. 438 (1986), 219 (1978), 230 (1979). However, in Open Records Decision No. 373 (1983), we concluded that personal financial information can generally be considered highly intimate and embarrassing:

In our opinion, all financial information relating to an individual — including sources of income, salary, mortgage payments, assets, medical and utility bills, social security and veterans benefits, retirement and state assistance benefits, and credit history — ordinarily satisfies the first requirement of common law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities. . . .

But, information regarding a financial transaction between an individual and a governmental body is a matter of legitimate public interest not generally protected from public disclosure by common law privacy. Open Records Decision Nos. 590 at 3 (1991), 523 at 3-4 (1989). For example, the salary of a public employee is not excepted from disclosure. Open Records Decision No. 342 (1982). Further, the doctrine of common law privacy does not generally except from disclosure public employee participation in an insurance program that is funded wholly or partially by his or her employer. Open Records Decision No. 600 at 9 (1992). Of course, personal financial information does not meet the test for common law privacy unless it is also of no legitimate interest to the public. In Open Records Decision No. 373 (1983), we concluded that the determination of whether the public's interest in obtaining highly intimate and embarrassing information is sufficient to justify its disclosure must be made on a case-by-case basis.

First, we note that information revealing the designation of beneficiaries of insurance and retirement funds is confidential under the right of privacy. Open Records Decision No. 600 at 10 (1992). Consequently, beneficiary information is excepted from required public disclosure under section 552.101 common law privacy. We have marked the information that must be redacted prior to the documents release.

Furthermore, it appears that some of the submitted information relates to the employee's voluntary allocation of his salary to health plans offered by the city. This office has ruled that participation in such plans is a personal financial decision that is protected by section 552.101. *See* Open Records Decision Nos. 600 (1992) (federal tax Form W-4, Employee's Withholding Allowance Certificate; designation of beneficiary of employee's retirement benefits; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history), 523 (1989). On the other hand, financial information that reflects the employee's mandatory contributions to the city's health plan must be disclosed. Open Records Decision No. 600 (1992). It is not apparent from the submitted documents whether the employee's participation in the health plans are mandatory or voluntary. Therefore, if the employee's participation in the health plans is mandatory, the city must redact the information which falls under section 552.117 prior to the release of the documents. However, if the

employee's participation in the health plans is voluntary, the documents must be withheld in their entirety.

In summary, you must withhold the information we have marked from public disclosure as explained above. You must release the remainder of the documents to the requestor.

Because we were able to find sections 552.101, 552.102, and 552.117 dispositive, we need not address your section 552.119 claim. This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

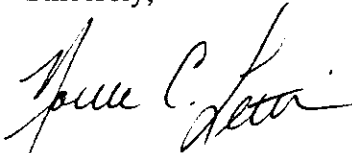
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Noelle C. Letteri". The signature is fluid and cursive, with the first name "Noelle" being more prominent than the last name "Letteri".

Noelle C. Letteri
Assistant Attorney General
Open Records Division

ncl/nc

Ref: ID# 135192

Encl. Submitted documents

cc: John Scott Smith
511 Marquette Drive.
Azul, Texas 76102
(w/o enclosures)